Perwik Sdn Bhd v Lee Yen Kee (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO–22–429–90
ZAKARIA YATIM J
5 AUGUST 1995

Contract *— Building contract — Construction of terms of contract — Whether permissible for defendant to vary terms of agreement on subsequent meeting — Whether terms of agreement complied with*

Contract *— Building contract — Progressive payments — Failure by plaintiff to deliver possession on time — Whether defendant entitled to withold progressive payment*

By an agreement and schedule of conditions of a building contract made on 4 March 1987 between the defendant and the plaintiff, the defendant appointed the plaintiff to be the main contractor for the construction of a project. Under the agreement, the plaintiff was to be paid on a progressive scale in respect of works done on the project. The plaintiff claimed that the project was completed on or about 25 June 1989 and was handed over to the defendant. The plaintiff contended that it had been agreed by all parties that the final contract sum would be RM3,035,280.25 but that, as at 31 December 1988, the defendant had only made payments totalling RM2,562,800 and accordingly, the plaintiff made a claim for the balance of RM467,480.25 which was still due and outstanding. The defendant denied being indebted to the plaintiff in the sum claimed. It contended that: (i) various payments had been made direct to the plaintiff's sub-contractors with the plaintiff's consent and approval; (ii) the plaintiff was in breach of the contract in failing to carry out plastering works to the project, whereupon the defendant had to engage its own contractors to carry out the works, that it had notified the plaintiff of the breach and that accordingly, it was entitled to deduct all sums paid to its contractors from the final contract sum; and (iii) the plaintiff had failed to deliver the housing units to the defendant on time with the result that the defendant had suffered damages. There were two appeals in the present proceedings. The first appeal was filed by the plaintiff against the decision of the senior assistant registrar that execution be stayed pending the outcome of the defendant's appeal. The second appeal was filed by the defendant against the decision of the senior assistant registrar granting leave to the plaintiff to enter summary judgment against the defendant.

Held, allowing the plaintiff's appeal and dismissing the defendant's appeal:

(1) It is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made. Thus, the defendant should not be allowed on subsequent meeting to vary the terms of the original agreement and schedule conditions

of the building contract. Under the terms of the contract, all payments were to be made to the plaintiff. Accordingly, by paying the sub-contractors direct, the defendant had done so at its own peril. Under the contract, the defendant was still liable to the plaintiff (see pp 862H and 863B–C); *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; [1970] 1 All ER 796; [1970] 2 WLR 728 followed.

(2) The contract provided that before the defendant could engage its own contractor to carry out the plastering work, the project architect had to give the plaintiff a written notice requiring compliance with its instructions to carry out the work. There was no evidence that such notice had been given to the plaintiff (see p 863C–F).

(3) In respect of the plaintiff's claim for progressive payment, the defendant had no right to withhold payment (see p 863G); *Woon Hoe Kan & Sons Sdn Bhd v Bandar Raya Development Bhd* [1971] 2 MLJ 213 followed.

(4) The defendant had no defence to the plaintiff's claim. It had not raised a triable issue. Furthermore, the counterclaim was not plausible and was frivolous. Accordingly, it was not reasonably possible for the defendant to succeed on the counterclaim at the trial (see p 863H); *Ronald Quay Sdn Bhd v Maheswaty Sdn Bhd* [1987] 1 MLJ 322 followed.

[Bahasa Malaysia summary

Melalui suatu perjanjian dan jadual syarat kontrak pembinaan yang telah dibuat pada 4 Mac 1987 di antara defendan dan plaintif, defendan melantik plaintif sebagai kontraktor utama bagi pembinaan suatu projek. Di bawah perjanjian tersebut, plaintif akan dibayar mengikut skala progresif berhubung dengan kerja yang dilakukan ke atas projek itu. Plaintif telah mendakwa bahawa projek itu telah disiapkan pada atau kira-kira pada 25 Jun 1989, dan telah diserahkan kepada defendan. Plaintif berhujah bahawa semua pihak telah mempersetujui bahawa jumlah kontrak yang muktamad adalah RM3,035,280.25 tetapi pada 31 Disember 1988, defendan hanya telah membuat bayaran berjumlah RM2,562,800 dan justeru itu, plaintif membuat tuntutan untuk baki sebanyak RM467,480.25 yang masih terhutang dan belum dijelaskan. Defendan menafikan bahawa dia berhutang dengan plaintif sebanyak jumlah yang dituntut. Ia berhujah bahawa: (i) pelbagai bayaran telah dibuat terus kepada subkontraktor plaintif dengan persetujuan dan kelulusan plaintif; (ii) plaintif telah memungkiri kontrak itu kerana gagal menjalankan kerja melepa ke atas projek itu, dan oleh yang demikian, defendan terpaksa mengambil kontraktornya sendiri untuk menjalankan kerja itu, bahawa ia telah memberitahu plaintif mengenai kemungkiran itu, dan bahawa dengan itu ia berhak untuk menolak kesemua jumlah yang telah dibayar kepada kontraktornya daripada jumlah kontrak yang

muktamad; dan (iii) plaintif telah gagal menghantar-serah unit rumah kepada defendan pada masa yang ditetapkan, dan oleh itu, defendan mengalami kerugian. Terdapat dua rayuan dalam prosiding ini. Rayuan pertama difailkan oleh plaintif terhadap keputusan penolong pendaftar kanan bahawa pelaksanaan digantung sementara menunggu kesudahan rayuan defendan. Rayuan kedua difailkan oleh defendan terhadap keputusan penolong pendaftar kanan yang memberi kebenaran kepada plaintif untuk memasukkan penghakiman terus terhadap defendan.

Diputuskan, membenarkan rayuan plaintif dan menolak rayuan defendan;

(1) Adalah tidak sah untuk menggunakan apa yang telah dikata atau dilakukan oleh pihak-pihak sebagai bantuan dalam pentafsiran suatu kontrak selepas kontrak tersebut telah dibuat. Oleh yang demikian, defendan tidak harus dibenarkan untuk mengubah terma perjanjian asal dan jadual syarat kontrak pembinaan itu di pertemuan kemudiannya. Di bawah terma kontrak itu, semua bayaran haruslah dibuat kepada plaintif. Ekoran itu, dengan membayar subkontraktor secara terus, defendan telah berbuat demikian atas risikonya sendiri. Di bawah kontrak itu, defendan masih bertanggungjawab kepada plaintif (lihat ms 862H dan 863B–C); *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; [1970] 1 All ER 796; [1970] 2 WLR 728 diikut.

(2) Kontrak itu memperuntukkan bahawa sebelum defendan boleh mengambil kontraktor sendiri untuk menjalankan kerja melepa, jurubina projek perlu memberi satu notis bertulis kepada plaintif menghendaki plaintif untuk mematuhi arahannya untuk menjalankan kerja itu. Tidak terdapat bukti bahawa notis sedemikian telah diberi kepada plaintif (lihat ms 863C–F).

(3) Berhubung dengan tuntutan plaintif untuk bayaran progresif, defendan tidak berhak untuk menahan bayaran (lihat ms 863G); *Woon Hoe Kan v Bandar Raya Development Bhd* [1971] 2 MLJ 213 diikut.

(4) Defendan tidak mempunyai pembelaan terhadap tuntutan plaintif. Ia tidak menimbulkan isu yang boleh dibicarakan. Tambahan pula, tuntutan balas itu adalah tidak munasabah dan meremehkan. Dengan itu, adalah tidak munasabah jika dikatakan defendan mungkin berjaya atas tuntutan balas di perbicaraan (lihat ms 863H); *Ronald Quay Sdn Bhd v Maheswcy Sdn Bhd* [1987] 1 MLJ 322 diikut.

Notes

For cases on construction of terms of building contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1276–1282.

Cases referred to

James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583; [1970] 1 All ER 796; [1970] 2 WLR 728
Ronald Quay Sdn Bhd v Mahesway Sdn Bhd [1987] 1 MLJ 322
Woon Hoe Kan & Sons Sdn Bhd v Bandar Raya Development Bhd [1971] 2 MLJ 213

Legislation referred to

Housing Developers (Control and Licensing) Act 1966
Rules of the High Court 1980 O 14

Fadzilah Mohd Pilus (*Adnan Sundra & Low*) for the plaintiff.
Nadzarin Wok Nordin (*Yazid Baba & Partners*) for the defendant.

Cur Adv Vult

Zakaria Yatim J: There were two appeals in these proceedings. The first appeal was filed by the plaintiff against the decision of the senior assistant registrar that execution be stayed pending the outcome of the defendant's appeal. The second appeal was filed by the defendant against the decision of the senior assistant registrar who granted the plaintiff leave to enter final judgment against the defendant under O 14 of the Rules of the High Court 1980. Both appeals were heard by me at the same time.

The plaintiff is a company incorporated in Malaysia and have a place of business at 31-1 and 33-1, Jalan 2/115A, Taman Pagar Ruyong, Jalan Kuchai Lama, Kuala Lumpur. The defendant is also a locally incorporated company and has its place of business at No 957, Jalan Sungai Chua, Kajang, Selangor. The defendant was a housing developer within the meaning of the Housing Developers (Control and Licensing) Act 1966 and was governed by the Act and the rules made thereunder.

By an agreement and schedule of conditions of building contract made on 4 March 1987 between the defendant and the plaintiff, the defendant appointed the plaintiff to be the main contractor for the construction of a project pursuant to the said agreement. Under the agreement, the plaintiff was to be paid on a progressive scale in respect of works done on the said project. The plaintiff claimed that it had completed the project on or about 25 June 1989 and the project was handed over to the defendant. The plaintiff averred that pursuant to a special meeting held on 12 May 1989 in the presence of the plaintiff, the defendant, and Arkitek Binarjaya, the parties reached agreement that the final contract sum would be RM3,030,280.25. The defendant had made payments totalling RM2,562,800 as at 31 December 1988. The plaintiff claimed that there was a balance sum of RM467,480.25 which was still due and outstanding. The plaintiff's claim was therefore for the sum of RM467,480.25 together with interests thereof at the rate of 8% pa for the date of the filing of the writ to the date of realisation; and costs of the action.

A The defendant admits that it was a housing developer and governed by the Housing Developers (Control and Licensing) Act 1966. The defendant admitted entering into a contract with the plaintiff on 4 March 1987 but denied that the terms thereof were accurately and completely set out in the contract. The defendant denied being indebted to the plaintiff B in the sum claimed. It averred that various payments were made direct to the sub-contractors of the plaintiff with the plaintiff's consent and approval. The defendant further averred that the plaintiff was in breach of the contract in that it failed to carry out plastering works to the project whereupon the defendant had to engage its own contractors to carry out the said works. The defendant had notified the plaintiff of the breach. The C defendant contended that it was entitled to deduct all sums paid to its contractors from the final contract sum. The defendant further averred that the plaintiff refused to deliver the housing units to the defendant on 25 June 1989 and only did so almost two months later, on 22 August 1989, whereby the defendant had suffered damages. Owing to the plaintiff's D wilful refusal to hand over the project, the defendant was unable to deliver possession of the individual units to the purchasers and the defendant was liable to pay the purchasers liquidated damages of 10% pa of the purchase prices. The defendant contended that it was entitled in law to set off all sums payable to the purchasers. The defendant alleged that the plaintiff had failed to follow the specifications in the contract. The plaintiff's work E was defective. The plaintiff also used defective materials whereupon the defendant had to rectify the works at its own costs. In its counterclaim, the defendant asked for:

(1) judgment for all sums paid by the defendant to the plaintiff's sub-contractors; F

(2) judgment for the costs of plastering work; and

(3) damages to be assessed for failure to deliver possession of the premises; judgment for the costs of rectification works; and interest at 8% pa plus costs.

G Encik Nadzarin submitted the defendant had raised a number of triable issues in its defence. He said that all the issues raised were corroborated by the quantity surveyor and the sub-contractors. He also asked for judgment be entered on the counterclaim.

In support of its claim, the defendant exhibited the final certificate by H Arkitek Binarjaya which states as follows:

> Re: Final Certificate
>
> Enclosed herewith the Final Certificate No B 103/81/PC - 24 (final) amounting RM475,880.25 (Ringgit: Four Hundred Seventy Five Thousand Eight Hundred And Eighty And Cents Twenty Five Only). I
>
> The above said balance due to you is subjected to deductions by Lee Yen Kee (M) Sdn Bhd for the following:
>
> 1 Amount RM150,000 paid to contractor following a special meeting on 12 May 1989.

2 Amount for sub-contract work paid to sub-contractors by employer on behalf of the contractor following mutual agreement between the parties concerned.

3 Amount RM5,000 for rectification of defects agreed by the contractor.

4 Any other direct payments made to contractor (to be advised by the employer's accounting department).

Thank you.
Yours faithfully,
Sgd
Henry I Lee

The defendant also exhibited a letter from Wong Electrical Engineering to the plaintiff dated 13 March 1989 which states:

Dear Sir,
Re: Cadangan Projek Perumahan Di Atas Lot 1826, Mukim Kajang, Daerah Ulu Langat, 104 Yunits Rumah Murah 2 Tingkat Di Atas Lot 5448 ke Plot 5454 dan Plot 5456 ke Plot 5552.

Request for Direct Progress Payment

We are referring to your recent discussion with the undersigned, this is to confirm that your firm will have no objection for the progress payment being made direct to us for works executed by the developer Messrs Lee Yen Kee (M) Sdn Bhd.

Therefore, we would be most appreciated if you could kindly confirm the same in writing to the developer so that future payments can be made direct to us accordingly.

Thank you in anticipation.

Yours faithfully,
Sgd
Wong Electrical Engineering

Miss Fadzilah said the above letter was never confirmed by the plaintiff. She submitted that the defendant should not be allowed on subsequent meeting to vary the terms of the original agreement and schedule conditions dated 4 March 1987. I agree with Miss Fadzilah's submission. In *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at p 603; [1970] 1 All ER 796 at p 798; [1970] 2 WLR 728 at p 732, Lord Reid said:

> I must say that ... it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

Clause 17(1) of the contract provided:

> The contractor shall not assign this contract or any part thereof or the obligation to carry out and the right to receive payment for any part of the works to be carried out under this contract or the right to receive the whole or any part of the contract sum without the prior written consent of the employer.

Clause 27(a) of the contract provides:

> Such sums shall be expended in favour of such persons as the architect shall instruct, and all specialists or others who are nominated by the architect are hereby declared to be sub-contractors employed by the contractor and are referred to in these conditions as nominated sub-contractors.

The contract also provides that all payments were to be made by the plaintiff: see *Hudson's Building and Engineering Contracts* (10th Ed) at pp 769 and 770.

In my view, the defendant by paying the sub-contractors direct, did so at its own peril. Under the contract, it was still liable to the plaintiff.

On the question of plastering work, the defendant said it had to engage its own contractor to carry out the work. Clause 2(1) of the agreement provided:

> The contractor shall (subject to sub-cll (2) and (3) of this condition) forthwith comply with all instructions issued to him by the architect in regard to any matter in respect of which the architect is expressly empowered by these conditions to issue instructions. If within seven days after receipt of a written notice from the architect requiring compliance with an instruction the contractor does not comply therewith, then the employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the contractor by the employer as a debt or may be deducted by him from any moneys due or to become due to the contractor under this contract.

I find that no evidence of a written notice had been given to the plaintiff.

I now turn to the allegation that the plaintiff had failed to deliver possession on time. The date of completion was 25 June 1989. Miss Fadzilah submitted that delivery was delayed to 22 August 1989 because the defendant had delayed in paying progressive payment to the plaintiff. In *Woon Hoe Kan & Sons Sdn Bhd v Bandar Raya Development Bhd* [1971] 2 MLJ 213, the learned judge in his judgment said at p 214:

> The claim here is in respect of progressive payment and the defendants have no right to withhold payment ...

In my view, the defendant has no defence to the plaintiff's claim. I find no triable issue raised by the defendant. I also find that the counterclaim is not a plausible counterclaim and it is frivolous. It is not reasonably possible for the defendant to succeed on the counterclaim at the trial. (See *Ronald Quay Sdn Bhd v Mahesway Sdn Bhd* [1987] 1 MLJ 322 which was upheld by the then Supreme Court.)

For the reasons stated above, I dismissed the defendant's appeal with costs and allowed the plaintiff's appeal with costs.

Order accordingly.

Reported by Alexandra Wong